ILE COPY

FILED
JAN 12 1959
BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 169

GROCERY DRIVERS UNION LOCAL 848, etc., *et al.*,

Appellants,

vs.

SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INCORPORATED,

Appellee.

On Appeal From the Supreme Court of the State of California.

Appellee's Reply to Appellants' Supplemental Jurisdictional Statement.

THOMAS P. MENZIES,
HAROLD A. WATT,
458 South Spring Street,
Los Angeles 13, California,
HILL, FARRER & BURRILL,
By CARL M. GOULD,
411 West Fifth Street,
Los Angeles 13, California,
Attorneys for Appellee.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 169

GROCERY DRIVERS UNION LOCAL 848, etc., *et al.*,

Appellants,

vs.

SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INCORPORATED,

Appellee.

On Appeal From the Supreme Court of the State of California.

Appellee's Reply to Appellants' Supplemental Jurisdictional Statement.

While we agree with Appellants' conclusion contained in their Supplementary Jurisdictional Statement that this Court should consider *Garmon* completely separate and apart from the instant case, we note that Appellants failed to state the most important reasons for such a conclusion.

One of those reasons is that any action on the part of this Court at this time in deciding the merits of this case would be a premature constitutional adjudication and such action would be based on assumptions of fact and theoretical conjectures. This is so because there has never ever in this case, as of this date, been any showing or determination that interstate commerce is affected or in

turn, that the Federal laws, upon which Appellants base their appeal, are in fact applicable.

The Court below directed the trial court to allow defendants (Appellants) to amend their Answer to allege and prove, if they are able to do so, that plaintiff (Appellee) is engaged in commerce. Thus far, the defendants (Appellants) have not done so but instead are pursuing this appeal on the *assumption* that interstate commerce is affected.

Furthermore, it is unquestioned that this case was tried on the theory that a *state* law had been violated; that the trial court based its decision on this theory and that the state appellate courts based their decisions on that same theory. At no time did any of the state courts apply the Federal law nor was it involved; accordingly a Federal question was not involved nor is it now presented to this Court.

Another reason that action by this Court on the merits of this case would result in premature constitutional adjudication is because the state court decree is not final: the whole case is not disposed of; all rights are not adjudicated; and, any doubts about whether Appellants have carried their burden of affirmatively establishing this Court's jurisdiction must be resolved against jurisdiction.

Whether or not the National Labor Relations Board might have passed on the question of whether the independent union was company dominated, as Appellants contend in their Supplementary Jurisdictional Statement, page 1, lines 6 through 21, is immaterial at this stage, because as this Court has recognized in the *Laburnum* case, *United Construction Workers v. Laburnum* (1954), 347 U. S. 656, 98 L. Ed. 1025, the power of a state court to award damages does not, by its very nature, conflict with the

jurisdiction of the National Labor Relations Board because that Board has no jurisdiction to award reparation.

While Appellants indicate under their point 2 on page 1 of their Supplementary Jurisdictional Statement that the only activity complained of occurred at secondary employers, the evidence upon which the judgment was founded did not involve strikes by employees of secondary employers, and the judgment was based upon concerted interference with the business of Appellee which conduct is not prohibited expressly by any provision of the Federal law and Appellants fail to cite any authority for the proposition that it is privileged or protected by the Federal statutes.

Even assuming the conduct were an unfair labor practice and violated the Federal law covering secondary boycotts and jurisdictional disputes, the state court has the power to award damages. The Federal law states that any court of competent jurisdiction has the power to award damages for violations of Sections 303(a)(1) and 303(a)(4) of the Act and "any court" includes state courts. (*International Longshoremen's Union v. Juneau Spruce Corp.* (1952), 342 U. S. 237, 96 L. Ed. 275.)

Potentially, then, the Board, a Federal court, and a state court could pass upon identical legal factual issues but the danger that the decisions might be different does not impair the power of any one of the three, including the state court, to decide them.

In the event of a conflict, the remedy of the aggrieved party is to resolve the cases by appeal on the merits as pointed out by the United States Supreme Court in *Amalgamated v. Richman Bros.* (1955), 348 U. S. 511, 99 L. Ed. 600, and the question relates to the merits, not to be jurisdiction of the body to pass on the case.

Here, however, the Appellants wrongly question the basic power of the state court to even adjudicate the matter when the state court clearly possesses that power, under the Federal law.

The state court also possesses the power to adjudicate and to grant damages when it applies its own state tort law, as it did in the instant case. Congress at no time intended to replace the state's traditional power to remedy torts by way of damages. This Court recognized that intention in the *Laburnum* case when it held that the state court had the power to apply its own tort law and award damages. But this Court has gone further than that in recognizing the state's power; it has already decided that one afforded a remedy by way of reparation under the National Labor Relations Act may nevertheless also be afforded a right to damages for a tort or breach of contract under state law. (*International Union v. Russell* (1958), 356 U. S. 634, 2 L. Ed. 2d 1030 and *International Association of Machinists v. Gonzales* (1958), 356 U. S. 617, 2 L. Ed. 2d 1018.) The principal reason for such holdings was that the Federal law was not as complete as the remedy afforded by the state law. In other words, the state law, over which the state court had jurisdiction to apply and to award damages, was based on a tort not covered by the Federal law.

Viewed in this respect the state tort law involved here also is based on a tort not covered by the Federal law and the state is operating in an area not controlled by Federal law. Based upon those cases, the state court here likewise

has the power to award damages; and there is no substantial question involved here for this Court to decide.

Therefore, we submit, as do Appellants, that this case should be considered separately from *Garmon;* but we further submit that this Court should dispose of this case by granting the Motion to Dismiss Appeal on file herein.

Respectfully submitted,

THOMAS P. MENZIES,
HAROLD A. WATT,
HILL, FARRER & BURRILL,
By CARL M. GOULD,
Attorneys for Appellee.